

FEDERAL COURT OF AUSTRALIA

Verma v Minister for Immigration and Border Protection [2018] FCAFC 87

Appeal from: *Verma v Minister for Immigration & Anor* [2017] FCCA 2079

File number(s): NSD 1661 of 2017

Judge(s): **NORTH, FARRELL AND DAVIES JJ**

Date of judgment: 7 June 2018

Catchwords: **MIGRATION** – Appeal from Federal Circuit Court (“FCCA”) dismissing appellant’s application for judicial review of a decision of the Tribunal affirming a decision of a delegate of the Minister not to grant the appellant a skilled visa – Appellant claimed to have satisfied the visa criterion of having “competent English” by obtaining sufficient scores in an IELTS test conducted in India by the British Council – British Council later found that an imposter sat the IELTS test on behalf of the appellant and revoked the appellant’s test scores on this basis – Visa application refused by a delegate of the Minister on the basis that the appellant did not demonstrate he had “competent English”, and that the IELTS scores were a ‘bogus document’ such that the appellant had not satisfied PIC 4020 – Appellant not informed of British Council’s investigation or of the outcome of that investigation until approximately 2 years later, at which point the records had been destroyed – whether the FCCA erred in failing to find that British Council acted in breach of procedural fairness – whether FCCA erred in failing to find that procedural fairness required the Minister to inform the appellant of the finding of the British Council.

Legislation: *Migration Act 1958* (Cth)

Cases cited: *Aggarwal v Minister for Immigration* [2015] FCA 1312
Minister for Immigration and Citizenship v Maman [2012] 200 FCR 30
Minister for Immigration and Border Protection v SZSSJ [2016] HCA 29
Minister for Immigration and Multicultural and Indigenous

Affairs v SCAR (2003) 128 FCR 553

Plaintiff M61/2010E v Commonwealth of Australia [2010]
HCA 41

*Plaintiff M174/2016 v Minister for Immigration and Border
Protection* [2018] HCA 16

R v Criminal Injuries Compensation Board Ex Parte A
[1999] 2 AC 330

*Re Minister for Immigration and Multicultural and
Indigenous Affairs* (2003) 211 CLR 438

Talukder v Minister for Immigration [2009] FCA 916

Wei v Minister for Immigration and Border Protection
[2015] HCA 51

Date of hearing:	26 February 2018
Registry:	New South Wales
Division:	General Division
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Category:	Catchwords
Number of paragraphs:	42
Counsel for the Appellant:	Mr L Karp
Solicitor for the Appellant:	ProActive Legal
Counsel for the First Respondent:	Mr PM Knowles
Solicitor for the First Respondent:	Clayton Utz

ORDERS

NSD 1661 of 2017

BETWEEN: **PARSHANT KUMAR VERMA**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **NORTH, FARRELL AND DAVIES JJ**

DATE OF ORDER: **7 JUNE 2018**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the costs of the first respondent, such costs to be taxed in default of an agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 1 The appellant has appealed the decision of the Federal Circuit Court of Australia (“FCC”) dismissing his application for judicial review of the decision of the second respondent (“**the Tribunal**”), which affirmed the decision of a delegate of the first respondent (“**the Minister**”) not to grant the appellant a Skilled (Residence) (Class VB) visa.

2 2 To obtain the visa, the appellant had to demonstrate that he had “competent English”: cl 886.213 of sch 2 to the *Migration Regulations 1994* (Cth) (“**Migration Regulations**”). By reg 1.15C of the Migration Regulations (as they were at the time), a person had “competent English” if, relevantly, the person satisfied the Minister that the person had achieved, in a test conducted not more than two years before the day on which the application was lodged, an International English Language Testing System (“**IELTS**”) test score of at least six for each of the four test components of speaking, reading, writing and listening. The appellant was also required by cl 885.224 of sch 2 to the Migration Regulations to satisfy Public Interest Criterion 4020 (“**PIC 4020**”), which, relevantly, required that there was no evidence before the Minister that the appellant had given, or had caused to be given, a “bogus document” in relation to the visa application.

3 3 The appellant lodged his visa application in June 2011 and submitted with the application an IELTS test report form stamped by the British Council containing the results of an IELTS test done in New Delhi, India on 7 May 2011. The IELTS test report form recorded that the appellant had scored more than six for each of the four test components. The British Council later cancelled the appellant’s IELTS results, citing as the reason that the appellant had used an impersonator to sit the exam on his behalf. The delegate of the Minister refused his visa application on the basis that the IELTS certificate provided by the appellant was a “bogus document” with the consequence that PIC 4020 was not satisfied. The appellant applied to the Tribunal for a review of the delegate’s decision. The Tribunal affirmed the delegate’s decision, finding that the British Council’s determination that another person undertook the test was probative evidence that the IELTS certificate provided by the appellant was a bogus document and, it followed, PIC 4020 was not satisfied.

Two key undisputed facts underpinned the appellant's application for judicial review of the Tribunal's decision by the FCC. The first key fact was that the British Council did not put the appellant on notice of the basis upon which it intended to cancel the IELTS test results before cancelling the test results, or of the fact that it had cancelled the results. The second key fact was that the Minister's Department did not advise the appellant that the British Council had cancelled the test results until nearly two years after the cancellation, by which time most of the records kept by the British Council relating to the appellant had been destroyed.

Before the FCC, the appellant argued that the Tribunal's decision was made in breach of the requirements of procedural fairness by reason of:

- (a) the conduct of the British Council in not informing the appellant of the reasons why, and the information upon which, his test results were cancelled before they were cancelled; and
- (b) the conduct of officers of the Minister's Department in not informing the appellant before the records of the British Council's investigations were destroyed, of the allegation that an impersonator had taken the test in the appellant's name.

The FCC did not find it necessary to determine whether the British Council had a duty to afford the appellant procedural fairness, holding that: (1) the decision of the British Council to cancel the appellant's test results was not a "migration decision" for the purposes of s 476 of the *Migration Act 1958* (Cth) ("the **Migration Act**") and was not amenable to judicial review in Australia; and (2) the validity of the Tribunal's decision was not conditioned on the British Council affording the appellant procedural fairness. The FCC also rejected the claim of denial of procedural fairness based on the "conduct" of the Department's officers, holding that: (1) there was no power exercisable by them that gave rise to the duty of procedural fairness alleged; and (2) the Departmental officers' acts or omissions were not matters that conditioned the validity of the Tribunal's decision.

BACKGROUND FACTS AND THE TRIBUNAL'S DECISION

Before turning to the grounds of appeal, the background facts and decision of the Tribunal require more elucidation.

8 In June 2011 the appellant lodged his visa application, which included the appellant's IELTS results.

9 On 7 July 2011, the British Council notified the appellant that it was conducting an investigation into his IELTS test results and he was asked to provide the following documents: (1) proof of his visa and tickets, stating the date of his departure from India and arrival in Australia; (2) the front and back pages of his passport; and (3) two alternative photo IDs approved by the Indian government authorities. The appellant provided the documents the following day. A few days later, he was advised by the British Council that it had completed its investigations on the documents sent; however it wanted to have a teleconference. The teleconference took place a couple of days later. In the teleconference, he was asked to confirm certain personal details. He asked the interviewer what the investigation was about, but was told that he could not be told as the investigation was at the preliminary stage but they would let him know of the outcome of the investigation once it was complete. He was told that if anything more was required he would be contacted. He did not hear anything further from the British Council.

10 On 5 December 2011 IELTS Australia notified the Department that the appellant had been involved in "malpractice" in his IELTS test, and that his results had been cancelled.

11 The Department did not communicate with the appellant until 30 September 2013, when it wrote to him notifying that it had received information which indicated that the IELTS certificate provided by the appellant was a bogus document "as it was procured through fraudulent means". The appellant was advised that his visa may be refused on the basis that he did not satisfy PIC 4020 "as evidence had been found in his visa application that suggests a bogus document or information that is false or misleading in a material particular has been submitted". He was invited to comment on this information.

12 On 1 October 2013 the appellant wrote to the British Council requesting a verification of his IELTS certificate. The British Council replied the following day that it only verified results for universities and immigration offices, and not for candidates.

13 The appellant responded to the Department's letter of 30 September 2013 on 2 October 2013 describing how he was contacted by the British Council in July 2011 regarding his IELTS test and how he had answered all the questions and provided documents to verify

his identity. He also advised that he had made enquiries of the British Council but was told that they could not give him any information.

14 14 On 20 November 2013 a delegate of the Minister rejected the appellant's visa application on the basis that the IELTS test result form that he had submitted with his visa application was a bogus document, which meant that the appellant did not satisfy PIC 4020. The appellant applied to the Tribunal for review of the decision.

15 15 The Tribunal hearing was listed for 14 August 2014. On 8 August 2014 the appellant provided a written submission to the Tribunal. The appellant indicated he understood that the reason the delegate did not grant the visa was that the delegate found it was not the appellant who sat and wrote the exam. The appellant claimed he had provided his candidate number "and all other documentation" the appellant had available to prove his innocence. The appellant said he had made numerous attempts to speak to the IELTS centre but, "[t]o date, there has been no evidence put before me to substantiate these claims put against me". After referring to his dealings with the British Council in July 2011 and November 2013 the appellant said (emphasis in original):

It is beyond my control to prove my innocence as there is no record on their system of my IELTS. I thought that records were to be maintained for a period of at least seven (7) years so that individuals did not suffer from any unjust situation as mine. I had prepared, sat and written the IELTS examination in India. I had prepared for the IELTS for approximately eight (8) months and during this time received training for IELTS as well.

Please take into consideration the following factors that I put forward in all honesty:

I attended the test centre to legitimately write the test;

I completed the test and followed the given instructions to submit the test;

My candidate ID . . . ; and

I genuinely wrote the exam and genuinely received the scoring.

I request that the Department of Immigration and Border Protection contact the IELTS centre and to confirm my results.

16 16 On 13 August 2014 the Tribunal obtained online verification of the results of the appellant's IELTS test. These showed that the appellant had received "0" in each tested category, indicating that he did not take the test. The Tribunal informed the appellant at the hearing on 14 August 2014 that it had obtained that information and based on that information, if accepted, it might find that the test result form that he provided with his visa application was false or misleading in a material particular and this would be reason for

affirming the delegate's decision because the appellant did not satisfy PIC 4020. The Tribunal gave the appellant an opportunity to respond or to comment on the information.

17 17 On 15 October 2014 the Tribunal contacted the British Council directly to inquire why the appellant's test results had been cancelled. On 8 November 2014 the British Council responded:

The scores on this test report were cancelled because the candidate used an impersonator.

18 18 This was put to the appellant in a s 359A letter on 14 November 2014.

19 19 On 25 November 2014 the appellant wrote to the Tribunal repeating his claim that he was trying to contact the British Council but it was not disclosing any information to him. He complained that he had not been immediately notified of the decision of the British Council in November 2011 to cancel his results. He asked for a further period of 30 days to respond.

20 20 The Tribunal declined to give him any further period but stated it would not make a decision until 5 December 2014.

21 21 On 26 November 2014 the Tribunal received further information from the British Council stating that the appellant's results had been cancelled "as it was determined after the release of the [appellant's] results that an imposter had taken the test". The email further advised that because a long time had elapsed since that test the British Council did not have any hard copy test materials relating to the investigation. The email enclosed two documents: the test report form in relation to an IELTS test undertaken on 7 May 2011 and a test report in relation to a test undertaken on 23 March 2013. Both documents had the appellant's name and date of birth and both documents had a passport size photograph of the person who took the test on that day. The email asserted:

I'm sure that you [the Tribunal] will agree it is not the same individual in the photos.

22 22 Having received this email and the two test report forms the Tribunal decided to hold a second hearing.

23 23 In December 2014 the appellant travelled to India and had two meetings with representatives from the British Council. The Tribunal's reasons recorded at [46]–[47]:

In the submissions of 5 January 2015, the applicant refers to two photographs, without explaining where these photographs appear. In the submission the applicant asserts that both are photographs of him contrary to the British Council's claims that one of the photographs is of a different person. Enclosed with the submissions were

copies of photographs from other IDs which belong to the applicant. According to the submissions, these additional photographs demonstrate that he looks different in different photographs and thus '[i]t would be highly ridiculous and unjust' for the Tribunal to conclude that he does not satisfy PIC 4020 because the British Council concluded incorrectly that the photo on one document was not his.

During the course of the resumed hearing, the applicant confirmed that the two photographs referred to in his written submissions were the photographs which appear on the TRFs of 7 May 2011 and 23 March 2013 (see above, paragraph 38). While the applicant was in India in December 2014, the British council had shown him these two documents. He gave oral evidence to the Tribunal consistent with the written submissions – he said that the photograph on the TRF relating to the test of 7 May 2011 was his photograph.

24 24 The Tribunal put this material to the appellant and advised that based on this information, if accepted, the Tribunal may find that there was evidence that the appellant had provided a bogus document to the Department and did not satisfy PIC 4020.

25 25 The Tribunal found that there was evidence that the IELTS test result forwarded to the Department was a bogus document within the meaning of s 97 of the Migration Act "because according to the British Council it was not the [appellant] who undertook the test". On that basis the Tribunal held that the appellant failed to satisfy PIC 4020(1) and therefore failed to satisfy cl. 885.224, which was a condition for the grant of the visa. In so holding, the Tribunal stated that it had no expertise in facial recognition and could not make its own determination as to whether the appellant had taken the IELTS test on 7 May 2011.

GROUND OF APPEAL

26 26 Initially the appellant's notice of appeal against the FCC decision had five grounds but ground 1 was not pressed. Grounds 2 to 5 are as follows:

2. The [Federal Circuit Court] erred in not asking itself whether, and in failing to find that, the British Council acted in breach of the requirements of procedural fairness in:
 - (a) Failing to inform the appellant of the reasons why, and the information upon which it was considering cancelling the results of his IELTS test taken in New Delhi in May 2011 before those results were cancelled.
 - (b) Failing to inform the appellant of the reasons why, and the information upon which, the published results of his IELTS test, taken in New Delhi in May 2011 were cancelled before the records of its investigations were destroyed.
3. The [Federal Circuit Court] should have found, and erred in failing to find, that either or both of the failures to inform set out in Ground 2 above caused the second respondent's jurisdiction to miscarry.
4. The [Federal Circuit Court] erred in holding that procedural fairness did not

require officers of the Department of Immigration and Border Protection to inform the appellant of the opinion of the British Council that his IELTS results had been obtained by fraud before its records were destroyed.

5. The [Federal Circuit Court] erred in finding that a letter issued by the Tribunal under s. 359A of the *Migration Act* cured any denial of procedural fairness committed by the British Council.

Grounds 2 and 3

27 27 Grounds 2 and 3 raise for determination the question as to whether the Tribunal's decision would be vitiated by a failure of the British Council to afford the appellant procedural fairness, assuming the claim of breach of procedural fairness by the British Council was established.

28 28 The appellant argued that:

- (c) (a) because the achievement of requisite scores in an IELTS test is a criterion for the grant of certain visas (which include the skilled visa applied for by the appellant) the British Council, as the body which supervises and verifies IELTS tests results, performs those functions for the purposes of the Migration Act;
- (d) (b) because the British Council's review of the appellant's IELTS results was part of the functions that the British Council performed for the purposes of the Migration Act, the British Council was required to afford the appellant procedural fairness in conducting its investigation;
- (e) (c) the British Council did not afford the appellant procedural fairness in conducting its investigation;
- (f) (d) because the Tribunal found that PIC 4020 was not satisfied by reason of the advice the Department had received from the British Council that the appellant had used an imposter to sit the IELTS test, the Tribunal's decision was impugned for jurisdictional error in consequence of the failure of the British Council to afford the appellant procedural fairness in conducting its investigation.

29 29 In support of its argument, the appellant relied on *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41 and *R v Criminal Injuries Compensation Board Ex Parte A* [1999] 2 AC 330 as authority for the proposition that there are circumstances where the actions of a non-statutory body can undermine the lawful exercise of power of

another body acting under statute. The FCC rejected a similar argument put by the appellant. At [63], the primary judge concluded that none of the cases relied on by the appellant in support of his argument were analogous, or sufficiently analogous, to compel the conclusion that the Tribunal made a jurisdictional error because the British Council had denied the appellant procedural fairness in forming its opinion that the IELTS test was sat by an imposter. The FCC reasoned as follows at [64]–[67]:

The issue before the Tribunal was whether the opinion the British Council communicated to the Tribunal that an imposter had undertaken the IELTS test on 7 May 2011 constituted evidence that the applicant had given to the Minister a “*bogus document*”. In particular, the question was whether the opinion of the British Council constituted evidence that the applicant’s TRF was a bogus document. That required the Tribunal to consider whether the opinion of the British Council was sufficiently probative to lead to the conclusion that the applicant’s TRF was a bogus document for any one of the three reasons specified in s.97 of the Act.

It is true that, at least for most purposes, the Regulations require the Minister to treat test results that the British Council records in documents that it issues, such as the applicant’s TRF, as conclusive evidence. The Regulations, however, assign no such status to other communications from the British Council. In particular, the Regulations did not require the Minister or the Tribunal to treat the British Council’s opinion that an imposter had sat for the IELTS test on 7 May 2011 as conclusive, or as anything more than information the Tribunal was required to consider for the purpose of determining whether it was probative evidence that the applicant’s TRF was a bogus document for any one of the three reasons specified in s.97 of the Act.

This distinguishes the case before me from *Maman*, *Plaintiff M61/2010E*, and *Wei*. In *Maman* the Regulations required the decision maker to accept the opinion of the third person. In *Plaintiff M61/2010E* the administrative scheme the Minister established in a practical sense required the Minister to accept the opinion of the independent assessor. And in *Wei* the decision maker was required to act only on the basis that the other person had performed the statutory duty imposed on that person. In the case before me, however, the opinion of the British Council was no more than an item of information which the Tribunal was not required to accept; rather, the Tribunal’s obligation was to assess the information for the purpose of determining whether it constituted probative evidence that the applicant’s TRF was a bogus document for any one of the three reasons specified in s.97 of the Act.

There is another reason why the facts of the case before me are materially distinguishable from the cases on which the applicant relies. Unlike those cases, the Tribunal in the case before me was required by s.359A of the Act to give to the applicant particulars of the British Council’s opinion to the extent the Tribunal considered the opinion would be the reason or part of the reason for affirming the delegate’s decision. That implies that the Tribunal’s decision was not conditional on the British Council’s according the applicant procedural fairness because the Tribunal itself was bound to provide to the applicant particulars of the opinion the British Council formed about who had undertaken the IELTS test on 7 May 2011 and afford the applicant an opportunity to make submissions.

We agree with those reasons.

31 30 In *Plaintiff M61/2010E*, the High Court considered the Independent Merits Review process which the Minister's Department developed for dealing with applications for the Minister to exercise his power under s 46A(2) of the Migration Act to determine that s 46A(1) did not apply to an offshore entry person. The effect of s 46A(1) was to preclude an offshore entry person from applying for a visa unless the Minister deemed it in the public interest that he be allowed to do so. Section 46A(3) provided that the power under s 46A(2) may only be exercised by the Minister personally. The Minister's Department developed an administrative process for dealing with applications for the exercise of power under s 46A(2). Under that process, an offshore entry person could request a Refugee Status Assessment which, in turn, was subject to an Independent Merits Review. These reviews were undertaken by people who were not Department officers but had been engaged by a company which the Department had contracted for the provision of such reviews. One of the issues considered by the High Court was whether, in conducting a review, the independent reviewer was bound to afford procedural fairness to the person whose claim was being reviewed and bound to act according to law by applying relevant provisions of the Migration Act. The Court held "yes". The reasoning was summarised at [9] as follows:

- (a) Because the Minister has decided to consider its exercising power under either s 46A or s 195A of *Migration Act* in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the [Refugee Status Assessment] and the [Independent Merits Review] processes taken in respect of each plaintiff were steps taken under and for the purposes of the *Migration Act*.
- (b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the enquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.

32 31 The Court expanded on its reasoning in later paragraphs. Central to the reasoning was that the enquiries undertaken in making a Refugee Status Assessment and the subsequent Independent Merits Review were enquiries made after the Minister had made the decision to consider exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations. The Court noted that the Minister was not obliged to take either step but, having made the decision, the Minister required his Department to undertake the inquiries necessary for him to make an assessment as to whether to exercise his power. The High Court reasoned that the Refugee Status Assessment and the Independent Merits Review processes were themselves steps taken under and for the purposes of ss 46A and 195A because the processes established by the

Department for the purposes of informing the Minister of matters relevant to the exercise of his statutory powers under s 46A and s 195A had a statutory foundation in the prior procedural decision of the Minister. Accordingly, it was held the assessors and reviewers were bound to afford a claimant procedural fairness in the way in which the assessment and any subsequent review were conducted: see also *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [54].

33 32 In contrast, no statutory step was undertaken by the British Council in reviewing the appellant's test results. This case is not analogous to *Plaintiff M61/2010E*. In this case, the Minister did not make any ministerial announcement of the kind in *Plaintiff M61/2010E* in relation to informing himself of matters relevant to his exercise of his statutory powers and nothing in the material supports a contention that the British Council's processes in supervising and reviewing IELTS test results were undertaken as an incident of the exercise of the Minister's powers, as distinct from merely performing its own checks and balances in respect of the integrity of the test results which it certified. Contrary to the appellant's submissions, it was not enough to make the review conducted by the British Council a function performed by it under and for the purposes of the Migration Act or the Migration Regulations just because a condition for the grant of the type of visa for which the appellant applied was achievement of the requisite scores in an the IELTS tests which the British Council supervised and verified.

34 33 Furthermore, contrary to the appellant's submissions, the present case does not have clear parallels with *Minister for Immigration and Citizenship v Maman* [2012] 200 FCR 30. That case concerned very different provisions of the Migration Act under which the Minister was obliged to "seek the opinion of an independent expert" on whether or not the visa applicant had suffered domestic violence (a visa criterion) in circumstances where reg 1.23(1C) provided that the Minister "must take an independent expert's opinion on the matter ... to be correct". In contrast, the British Council does not exercise any statutory power given to it under the Migration Act or Migration Regulations, nor are any requirements imposed on it by or under the Migration Act or Migration Regulations concerning the IELTS testing which it supervised (cf. *Wei v Minister for Immigration and Border Protection* [2015] HCA 51).

35 34 *R v Criminal Injuries Compensation Board* also does not assist the appellant. In that case, the House of Lords held that judicial review of a Board decision was available because,

objectively, the result was “unfair”. The “unfairness” was that the Board had made a decision which was correct on the information before it but there was a report in existence which, if it had been put before the Board, may well have led to a different result. Australian courts have not followed the approach in *R v Criminal Injuries Compensation Board* and there is substantial doubt over whether it represents the law in Australia: see *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 211 CLR 438; *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [27]. The case is also distinguishable on the facts. In the present case, the Tribunal, consistently with the requirements of s 359A of the Migration Act, gave the appellant particulars of the information received from the British Council and invited his comment. The question for the Tribunal was whether PIC 4020 applied in light of the advice that the Department received from the British Council that the appellant had used an imposter to sit the IELTS test.

36 35 PIC 4020 relevantly provides:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made....
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.
- (5) In this clause:

information that is false or misleading in a material particular means information that is:

 - (a) false or misleading at the time it is given; and

- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: For the definition of **bogus document**, see subsection 5(1) of the Act.

37 36 “Bogus document” is defined in s 5(1) of the Migration Act as follows:

“**bogus document**”, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

38 37 The Tribunal only needed to be satisfied that there was some probative evidence that the appellant had provided a bogus document: *Talukder v Minister for Immigration* [2009] FCA 916 at [20]; *Aggarwal v Minister for Immigration* [2015] FCA 1312 at [45]. The Tribunal took into account that the test materials were no longer available and the Tribunal itself was unable to compare the photographs. None of that however, meant that the Tribunal could not rationally give weight to the findings of the British Council. The FCC dealt with this point at [70], reasoning as follows:

The Tribunal disclosed to the applicant the opinion of the British Council that an imposter had sat the IELTS test on behalf of the applicant. The Tribunal also disclosed the basis on which the British Council had formed that opinion, namely, the comparison of photographs purportedly of the applicant. The applicant therefore had an opportunity to make submissions to the Tribunal that showed it was he who had undertaken the test on 7 May 2011. The applicant certainly asserted he did undertake the test, and he provided some evidence, in the form of another photograph, which he claimed was of him. The applicant, however, provided no other evidence that it is reasonable to suppose would have been available to him to provide had he in fact undertaken the exam. For example, the applicant gave no evidence about the circumstances in which he booked the exam, about the payment or payments that were made for the test, an account of where the examination was held, the time at which it was held, his attending the place where the examination was held at the time it was held, the procedure that was followed immediately before, and during the examination, whether he provided or was provided documents during the examination, or about how he came into the possession of the applicant’s TRF. It is true the Tribunal did not disclose to the applicant records the British Council had generated in the course of the investigation that led to its concluding an imposter undertook the 7 May 2011 test. The applicant does not submit, however, and there is nothing to suggest, that the Tribunal had access to, or relied on such documents.

We agree with the primary judge's analysis. On the evidence which was before the Tribunal the British Council's findings plainly constituted probative evidence for the purposes of PIC 4020.

39 38 Accordingly, no error is shown in the FCC's conclusion that the validity of the Tribunal's decision was not conditioned on the British Council according the appellant procedural fairness.

Ground 4

40 39 The FCC dealt with this ground at [72]–[76], concluding that the Tribunal's decision was not conditioned on officers of the Department having communicated to the appellant the adverse opinion of the British Council. The FCC reasoned as follows at [73]–[75]:

First, the duty to accord procedural fairness attaches to a power which, when exercised, is capable of adversely affecting the interests of a person. As was said in *Minister for Immigration and Border Protection v SZSSJ*; *Minister for Immigration and Border Protection v SZTZI*:

The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.

The applicant does not identify the power which the Departmental officers exercised or were required to have exercised which attracted the duty to accord procedural fairness on which the applicant relies and which he submits the Departmental officers failed to perform. In my opinion, there was no power exercisable by the Departmental officers that gave rise to a duty by them to afford the applicant procedural fairness the applicant alleges they were required to afford to the applicant.

Second, the Departmental officer's acts or omissions are not matters that can be said to have conditioned the delegate's or the Tribunal's exercise of power. There is nothing in the Act or Regulations that impose a duty on Departmental officers to communicate to the applicant the Department's receipt of adverse opinions from the British Council before the British Council destroyed records relevant to the opinions. And there is nothing in the Act or the Regulations that require the Minister or the Tribunal to be satisfied that Department officers had performed any such duty before the Minister or the Tribunal on review could exercise their powers.

We agree with those reasons.

41 40 The question is whether the Tribunal's procedures were affected by error, not whether the delegate complied with any obligation of procedural fairness. The jurisdiction of the Tribunal did not depend upon performance by the delegate of her obligations under s 57. That is because an error on the part of the delegate does not deprive the Tribunal of jurisdiction:

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 at [69]-[72]. But in any event, no provision in the Migration Act required notice of adverse information to be provided to the appellant within a particular time frame, save that under s 57 of the Migration Act certain information had to be given prior to a decision being made by the delegate. As the facts show, the appellant was given a reasonable opportunity to comment upon the information before the delegate made her decision. Accordingly, there is no merit in this ground.

Ground 5

42 41 Ground 5 alleges that the FCC erred in finding that the letter issued by the Tribunal under s 359A of the Migration Act “cured any denial of procedural fairness committed by the British Council”. The FCC made no such finding, but in any event this ground must also fail having regard to our conclusions on grounds 2, 3 and 4.

CONCLUSION

43 42 For these reasons the appeal should be dismissed with costs.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Farrell and Davies.

Associate:

Dated: 7 June 2018